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ship. If the sale is a result of condemnation proceedings, for example, the proceeds awarded the owners should be held by them in the same manner as they owned the property condemned.[17] In such a situation, the proceeds from joint tenancy property should retain the character of the property from which they were acquired. This seems to be the ruling most likely to give effect to the intent of the parties. For the same reason, if the sale is the result of a foreclosure on a mortgage of jointly owned property, any sum realized in excess of the amount required to satisfy the debt should belong to the mortgagors in the same manner as they previously owned the property. Since the sale was involuntary there is no room for the inference that the parties intended to sever the joint tenancy or the estate by the entireties, while such an inference may be easier to draw in the case of a voluntary sale.

It is probably more common that parties selling jointly owned property will not express an intent as to the form of ownership by which they desire to hold the proceeds of the sale. As pointed out above, courts have taken different positions on how survivorship is effected by failure of the parties to express this intent. It would seem the preferable view would be to infer from their silence in this respect that they want to own the proceeds in the same way they formerly owned the property. Courts should require strong evidence of a contrary intent before holding that a sale by all joint tenants or tenants by entireties destroys survivorship in the proceeds of sale.

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BASIC MISCONCEPTIONS OF THE DECLARATORY JUDGMENT LAW

Since the early part of the century, Section I of the Uniform Declaratory Judgments Act[1] has been adopted, with some modification, in over half of the states.[2] In 1934 Congress passed the Federal Declaratory Judgments Act[3] which was declared constitutional four years later in the celebrated case of *Aetna Life Insurance Co. of Hartford, Conn. v. Haworth.*[4] The primary object of this act, like the Uniform Act, was to provide for a speedy and inexpensive method of adjudicating legal disputes before damage had actually been suffered and the act was to be liberally construed to that end.[5]

17. In re Zaring Estate, 93 Cal.App.2d 577, 209 P.2d 642 (1949).

1. Uniform Declaratory Judgments Act, 9 U.L.A. 234 (1922). Sec. I: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree."
2. Borchard, Declaratory Judgments 25 (2d ed., 1941).
3. Act of March 3, 1915, c. 90, § 274 (a), 38 Stat. 956, as amended June 14, 1934, c. 512, 48 Stat. 955, 28 U.S.C.A. § 400.
4. 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000 (1937).
5. Lehigh Coal & Navigation Co. v. Central R. of New Jersey, 33 F.Supp. 362 (E.D.Pa. 1940).

In recent years the declaratory judgment has become an extremely important type of action, but neither the advantages nor the purposes inherent in declaratory actions have been fully recognized by some courts, and in some instances the nature and purpose of the remedy have been misconstrued. The cases herein presented illustrate the basic misconceptions of some courts and indicate whether there has been a trend in the right direction.

A frequent error made by the courts has been to refuse to entertain an action for declaratory judgment where another equally serviceable remedy is available.[6] In an Ohio case[7] the question was raised as to whether the Uniform Declaratory Judgments Act is an alternative remedy. The court held that it was not alternative in the sense that the action always lies although full relief may be had, or a suit at law may be maintained. It went on to say that it was alternative in the sense that it lies nothwithstanding the fact that another remedy is available, but only in those cases in which speedy relief is necessary to the preservation of rights which might otherwise be impaired or lost.

Radaszewski v. Keating,[8] another Ohio case, presents an illustration of a factual situation where speedy relief is necessary. Plaintiff brought an action for declaratory judgment in which a declaration of property rights was given even though the property was in an estate that was currently being administered. The court felt that an immediate adjudication was necessary because the defendant executrix had fraudulently omitted the property from the inventory, not recognizing declaratory judgment as completely alternative. The court stated that the case was still in accord with *Stewart v. Herten*,[9] which expresses the broader rule that declaratory judgment will be denied if another equally serviceable remedy is available. It is interesting to note that a Wyoming court stated this rule and cited the same case in *Anderson v. Wyoming Development Co.*,[10] but only as obiter dictum, since the holding of that case was that the complaint did not present a justiciable controversy, and that the action was barred by the statute of limitations and the doctrine of laches.

Ohio apparently broke from its previous rule in 1949.[11] Plaintiff brought an action for declaratory judgment against the Administrator of the Bureau of Unemployment Compensation. The question was whether the agents of the plaintiff were in employment within the meaning of the act. The plaintiff conceded, and the court recognized, that he could apply to the administrator for a ruling. The court, nevertheless, gave judgment

6. Anderson v. Wyoming Development Co., 60 Wyo. 417, 154 P.2d 318 (1944); Thrillo, Inc. v. Scott, 15 N.J.Super. 124 (1952); Nassaw Lake Realty Corp. v. Hilts, 106 N.Y.S.2d 216 (1952); Stewart v. Herten, 125 Neb. 210, 249 N.W. 552 (1933).
7. Schaefer v. First National Bank of Findlay, 134 Ohio St. 511, 18 N.E.2d 263 (1938).
8. 141 Ohio St. 489, 49 N.E.2d 167 (1934).
9. 125 Neb. 210, 249 N.W. 552 (1933).
10. 60 Wyo. 417, 154 P.2d 318 (1944).
11. American Life & Accident Insurance Co. of Kentucky v. Jones, 152 Ohio St. 367, 89 N.E.2d 301 (1949).

for the plaintiff although one judge dissented vigorously. Patently the plaintiff had an adequate remedy by proper application to the administrator. The action, therefore, might have been dismissed. Instead, the court in allowing the action permitted a complete settlement of the controversy without procedural technicalities or delay.

Some courts have reached a more satisfactory result by holding that a suit can be maintained even though some other remedy at law or equity is adequate.[12] The declaratory judgment should be regarded as an alternative remedy because of its procedural simplicity and availability. It permits a plaintiff to establish his rights over another's objection without presenting the complicated, and often undesirable issue of damages. Under the Federal Rules of Civil Procedure,[13] the existence of another remedy does not bar remedy by declaratory judgment if such remedy is appropriate. Regardles of the obiter dictum to the contrary in *Anderson v. Wyoming Development Co.*,[14] it cannot be doubted that, henceforth, the declaratory judgment shall be considered as an alternative remedy in Wyoming since new rules were recently adopted expressly recognizing it as such.[15]

The declaratory judgment as an alternative remedy is important also in the sense that a complaint which demands only a declaration of rights may be less disruptive of the relations between the parties. A good illustration of this is a Massachusetts case.[16] Plaintiff, as lessor, brought suit in a court of equity for reformation of a lease after a controversy arose between the parties as to which one was obligated to pay the tax on a part of the building leased. The trial court found no grounds for reformation but permitted the plaintiff to amend the prayer and substitute a request for a declaratory judgment for the recovery of tax already paid by the plaintiff. The plaintiff was permitted to establish his rights without the appearance of coercion. There was every indication that he would wish to rely on the defendant's good faith for his remedy. The damages were liquidated. In such a case the defendant would be likely to act in accordance with the court's judgment without the application of coercive force.

In an interesting case,[17] the court, believing that the coercive remedy asked for was inappropriate, granted instead a declaratory judgment. The plaintiff had asked for an injunction restraining defendants from constructing an obstruction on disputed property. The court recognized that in some cases it is obvious that an injunction is necessary. However, if the only question is whether an obstruction is legal or not, and if the defendant has acted fairly and not in an unneighborly spirit, the court should incline merely to declare the extent of the plaintiff's easement and not grant an injunction.

12. Cobb v. Harrington, 144 Tex. 360, 190 S.W.2d 709 (1945).
13. Fed. Rules of Civ. Proc., Rule 57; Yellow Cab Co. v. City of Chicago, 186 F.2d 946 (7th Cir. 1951).
14. Supra note 10.
15. Wyo. Rules of Civ. Proc., 11 Wyo. L.J. (Spec. Supp. 1957).
16. Callahan v. Broadway National Bank, 286 Mass. 473, 190 N.E. 792 (1934).
17. Hassebring v. Koepke, 263 Mich. 466, 248 N.W. 869 (1933).

A second restriction on the use of the remedy has been the view that it is improper to grant declaratory relief if the sole question involved is a fact issue. Generally, courts have used this reason to rebuff declaratory actions in those cases where the wrongdoer attempts to anticipate the legal action of the injured party by suing first for a declaration of non-liability. Where the injured party has not threatened to act, or where it is uncertain that litigation will ensue between the parties, a court is certainly correct in refusing to grant a declaratory judgment. Indeed, it would be extremely burdensome on the judicial system if every set of facts indicating the slightest suspicion that a party will eventually take legal action, could be considered ripe for judicial determination.

An excellent example of a premature cause of action is in a Minnesota case.[18] Plaintiff brought a declaratory action alleging that he was *informed and believed* that the defendant had recently claimed that the plaintiff was indebted to him. The court, admitting that in certain instances an anticipatory action would be proper, nevertheless sustained defendant's demurrer. A mature cause of action had not accrued to the defendant, at least the facts alleged did not indicate any, nor had the defendant, at any time, threatened to sue. It appears that the plaintiff had obtained his information from a third party and probably, nothing but a rumor at that.

In a Michigan case[19] the trial court granted a declaratory judgment in a case which seemed to be a proper one for declaratory relief but the appellate court reversed it on the grounds that only questions of fact were presented. Plaintiff, an insurance company, filed a petition for declaratory judgment alleging non-liability under the policy for the reason defendant, at the time of the accident, was driving in a speed contest. An action had already been filed against defendant by the injured party alleging negligence on the part of defendant in losing control of the automobile. It was fairly certain that an action would be brought by the defendant against the insurance company. It was advantagous to the insurance company to know whether it was liable since they would prefer to defend the pending action if it were. But because only a question of fact was raised; whether defendant was driving in a speed contest at the time of the accident, declaratory judgment was held not the proper relief.

In an Ohio case[20] the facts were even stronger in favor of granting a declaratory judgment. Plaintiff asked for a declaration of its rights under a policy of insurance. The defendant's son was involved in an accident while driving the car in which the son and another party were killed and one injured. Claims had already been presented to the plaintiff. Plaintiff, in its declaratory action, alleged that the son was driving without the defendant's permission and in violation of a condition in the policy.

18. Stark v. Rodriquez, 229 Minn. 1, 37 N.W.2d 812 (1949).
19. State Farm Mutual Auto Insurance Co. v. Wise, 277 Mich. 643, 270 N.W. 165 (1936).
20. Ohio Farmers Ins. Co. v. Heisel, 143 Ohio St. 519, 56 N.E.2d 151 (1944).

The court held that a declaration will not lie with reference to an insurance policy when no question of construction or validity thereof is raised. It is true that only questions of fact were raised, but under such a holding the plaintiff would have two choices. Either sit back and wait until suit were brought against the defendant and hope that the judgment would be in his favor, or intervene and defend. If it defends and obtains judgment, it will have suffered the expense of a trial. If it sits back and judgment is obtained against the defendant, the cost may be even greater.

But in a later case[21] plaintiff brought an action to have declared the relation of the parties under a lease, the defendant having remained in possession after the lease had expired. Although no question was raised as to the construction of the lease, the court granted declaratory judgment as to the facts with reference to the continued occupancy. Ohio broke away completely from its previous position in a 1951 case.[22] There the court held that where the determination of an issue of fact is involved in declaratory judgment, such issue may be tried in the same manner as issues of fact are tried and determined in other civil actions.

The United States Supreme Court has avoided much confusion by holding that, although a dispute turns upon questions of fact, it is not withdrawn from judicial cognizance; the determination of issues of fact is necessary in order to determine the legal consequences and is part of the every day practice of courts.[23] A substantial percentage of lawsuits turn wholly on disputed issues of fact. The declaratory judgment would be of little value if no declaration could be granted unless a substantial issue of law were presented.

A third restriction on the use of the remedy is the clause in the act[24] which confers upon the courts discretion to refuse declaratory relief if the judgment would not terminate the uncertainty or controversy. California has been accused of applying this discretionary power rather broadly.[25] In an interesting California case[26] plaintiff brought an action against his former wife for declaratory relief seeking a determination of his obligations under a property settlement agreement. The appellate court, while recognizing that the allegations were sufficient to state a cause of action for declaratory relief, nevertheless affirmed the order sustaining a demurrer to the complaint. The appellate court reasoned that the lower court could well have considered the equitable doctrine of "in pari delecto" even though the declaratory judgment is not equitable but a remedy sui

21. Cashocton Real Estate Co. v. Smith, 147 Ohio St. 45, 67 N.E.2d 904 (1946).
22. Travelers Indem. Co. v. Cochrane, 155 Ohio St. 305, 98 N.E.2d 840 (1951).
23. Aetna Life Ins. Co. of Hartford, Conn. v. Hayworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000 (1937).
24 Uniform Declaratory Judgments Act, 9 U.L.A. 332 (1922). Sec. 6: "Discretionary. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."
25. Breese, Atrocities of Declaratory Judgment Law, 31 Minn. L. Rev. 575 (1947).
26. Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526 (1942).

generis. However, the same court in a recent case[27] held that declaratory relief must be granted when the facts in the case justifying that course are sufficiently alleged. Plaintiff brought an action for declaratory judgment seeking an accounting on a contract whereby he was to receive a certain percentage of net profits earned by defendant company. The lower court entered judgment dismissing the complaint on the ground that plaintiff could obtain a money judgment, conceding that there existed an actual controversy. The appellate court reversed the judgment stating that discretion in refusing to exercise power is not unlimited and is subject to appellate review.

The two criteria set forth by Borchard[28] which should be used by the courts in guiding their discretion in rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It is noteworthy that a Federal Court[29] followed these two criteria in reversing the judgment of a lower court[30] which had denied declaratory relief on the grounds that the questions presented were moot. Courts have used a number of words which tend to characterize the discretion that is to be used in granting or denying declaratory relief such as: that it as a judicial discretion;[31] that it may not be arbitrary;[32] that it must be limited and controlled;[33] that it must be based upon fixed principles of law,[34] and many others,[35] which take many forms and, in some instances, are very ambiguous.

The preceding cases have been set forth in an attempt to show the mistakes and basic misconceptions courts have made respecting declaratory judgment law and the possible trends that have taken place in certain states. However, a great deal of change is still needed. The declaratory judgment has opened the door to adjudication of disputes not heretofore capable of judicial relief and courts should liberally construe the act so as to clarify and stabilize unsettled legal relations.

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27. Kessloff v. Pearson, 37 Cal.2d 609, 233 P.2d 899 (1951).
28. Borchard, Declaratory Judgments 107 (1934).
29. American Cas. Co. of Reading, Pa. v. Howard, 173 F.2d 924 (4th Cir. 1949).
30. American Cas. Co. of Reading, Pa. v. Howard, 80 F.Supp. 983 (W.D.S.C. 1948).
31. Johnson v. Interstate Transit Lines, 163 F.2d 125, 172 A.L.R. 1242 (10th Cir. 1947).
32. E. B. Kaiser Co. v. Ric-Will Co., 95 F.Supp. 54 (N.D. 1950).
33. Zamora v. Zamora, 241 S.W.2d 635 (1951)
34. Pomerantz v. Jean Vivaudow Co., 65 F.Supp. 948 (S.D.N.Y. 1946).
35. Manchester Gardens, Inc. v. Great West Life Assur. Co., 205 F.2d 872 (U.S.A.D.C. 1953); Smith v. Mass. Mut. Life Ins. Co., 167 F.2d 990 (5th Cir. 1948); Essick v. City of Los Angeles, 34 Cal.2d 614, 205 P.2d 86 (1949); Wheeler v. Wheeler, 81 N.Y.S.2d 805 (1948); Purdy v. City of Newburgh, 113 N.Y.S.2d 376 (1952); Ralphs Grocery Co. v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 439, 98 Cal.App.2d 539, 220 P.2d 802 (1950).